

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Communications Assistance
for Law Enforcement Act

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CC Docket No. 97-213

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF PAGING NETWORK, INC.

Respectfully submitted,

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Summary

Paging Network, Inc. ("PageNet") hereby provides its comments in response to the *Notice Of Proposed Rulemaking* initiated to implement the Commission portion of the Communications Assistance for Law Enforcement Act ("CALEA"). In these comments, PageNet recommends that the Commission adopt rules and procedures that: (1) minimize the regulatory burden on carriers; (2) adopt simple CALEA rules and procedures for carriers; and (3) apply such rules after the appropriate capability standards have been adopted.

Information service providers should be excluded from the definition of telecommunications carrier for the purposes of CALEA and not be subject to CALEA capability requirements. Information services provided by telecommunications carriers should also be excluded from the CALEA capability requirements because: (1) information services were explicitly excluded from the CALEA Section 103 capability requirements; (2) telecommunications carriers may be unable to provide enhanced services if such services must be CALEA compliant; and (3) requiring telecommunications carriers to be CALEA compliant with respect to their information services, while excluding pure information service providers, would cause a disparity among information service carriers and providers.

If a telecommunications carrier packages or resells certain services, because the carrier is a reseller and not the network operator for that particular service, the telecommunications carrier is not in a position to effect an interception for that service. To the extent necessary to ensure that the appropriate carrier or carriers have the necessary obligations, the rules should establish that a carrier is not required to obtain information or effectuate interceptions where the information or the ability to effectuate the interception rests in the control of another carrier.

Rather than adopting detailed and inflexible rules for all carriers regarding CALEA compliance, the Commission should establish a simple framework that allows carriers to fashion their own internal procedures. The framework would include: (1) specific training for employees; and (2) safeguards to ensure that interceptions are made lawfully and unlawful interceptions are prevented.

The Commission should codify in its rules that only a court order or a letter certification from a senior law enforcement official under Section 18 U.S.C. § 2518(7) will suffice as a lawful authorization for an interception. If carriers comply with these forms of authorization, carriers should be shielded from all liability for interceptions that later are determined to be unlawful and shielded from penalty, if the carrier refuses to

initiate an interception because it believes that the purported authorization is insufficient.

Every carrier should be able to certify that it is CALEA compliant without having to submit a plan to the Commission for review and approval. Carriers would certify that they comply with the Commission's CALEA rules and policies pursuant to the framework established by the Commission in this proceeding. This will allow carriers and the Commission to conserve resources and lessen the regulatory burden.

Without the CALEA technical standards, it is difficult to predict how onerous compliance will be. The Commission should set forth rules and policies that consider the burden on carriers who have not had the benefit of established capability standards when building networks and offering new services. If the carriers determine that over the short term the burden is high, the Commission should provide a meaningful opportunity for carriers to demonstrate that the CALEA capability requirements are not reasonably achievable.

Several factors mandate that the Commission consider the question of extensions under Section 107 of CALEA today. The most compelling factor is that the CALEA capability standards have not been established. PageNet suggests that, based on these comments or on the Commission's motion, the Commission extend the compliance period to October 24, 2000. In the alternative, the Commission could initiate a inquiry into whether an industry wide extension (or partial industry) is appropriate.

this reason, the Commission should provide an opportunity for carriers to suggest changes to the CALEA rules in the future, once the standards have been finally established.

In these comments, PageNet wishes to share its experience in the hope that the implementation of the FCC's portion of CALEA meets the requirements of law enforcement agencies without subjecting carriers to unnecessary and costly regulatory processes. In implementing CALEA, PageNet recommends that the Commission adopt rules and procedures that:

1. Minimize both the Commission's and carriers' regulatory burden, e.g., individual carrier's certification of CALEA compliance rather than a detailed filing and FCC in depth FCC review of the carrier's CALEA compliance procedures;
2. Adopt simple rules and procedures for carriers to follow when assistance is sought by law enforcement agencies; and
3. Apply such rules and procedures only after the appropriate capability standards have been adopted by the industry in conjunction with law enforcement agencies.

II. The CALEA Rules Should Minimize The Regulatory Burden On Carriers And On The Commission

A. Telecommunications Carriers Should Only Be Responsible For CALEA Technical Capability Requirements For Services Offered Over The Carriers' Network

In the *Notice*, the Commission sought comment on its tentative conclusion that information service² providers be excluded from the definition of "telecommunications carrier" for

² Information Services would encompass enhanced services. See, e.g., H.R. Rep. No. 103-827, 103d Cong., 2d Sess. pt. 1, at 2 (1994).

the purposes of CALEA.³ Although this exclusion would obviate a requirement that information service providers modify their networks to comply with CALEA capability requirements, this exclusion would not exempt information service providers from complying with a lawful authorization for records and other information regarding their subscribers. PageNet agrees with the Commission's tentative conclusion that information service providers be excluded from the definition of telecommunications carrier for the purposes of CALEA.

In this context, however, the Commission should establish that information services provided by telecommunications carriers are also excluded from the CALEA capability requirements. In other words, although a telecommunications carrier would be subject to the CALEA capability requirements for basic telecommunications services, if an information (enhanced) service is also offered to the subscriber in conjunction with the carrier's basic service, the basic telecommunications aspect of the service should not contaminate the information service's to require CALEA capability requirements for the information service.

In the Notice, the Commission sought comment on the applicability of CALEA's requirements to information services provided by common carriers.⁴ There are at least three

³ Notice at ¶ 20.

⁴ *Id.*

significant reasons why the Commission should exclude telecommunications-carrier-provided information services, i.e., information services, from the CALEA capability requirements. The first is that information services are explicitly excluded from the CALEA capability requirements.⁵ Moreover, in some information service applications, the data or information is manipulated. As such, it may not be possible to achieve meaningful interception. This means that it is unlikely that a significant portion of the equipment used to provide information services will ever become CALEA capability compliant. The cost factor alone would be prohibitive.

The second reason is closely related to the first. If information services offered by telecommunications carriers are subject to CALEA capability requirements, the net result would be that telecommunications carriers would be unable to provide information services because they would be unable to meet the CALEA requirements. It could not have been the intent of Congress when enacting the CALEA statute to restrain the service offerings made to the public by telecommunications carriers because such services would be too expensive to offer if made capable of being intercepted.

The third reason is parity. If telecommunications carriers must make their information services CALEA compliant, pure information service providers with whom telecommunications

⁵ *Id.* at ¶ 19.

carriers compete will have an advantage over telecommunications carriers both in ability to bring informational services to customers and in the cost of such services. The Commission should make all information services exempt from CALEA capability requirements no matter the type of carrier because there is no legitimate basis for requiring carriers to make information services CALEA compliant when non-carriers offering the same or similar services are not subject to the same or similar regulatory burdens.

B. The Commission Should Establish That CALEA Compliance Responsibility Relates To Services Over Which A Carrier Has Network Control

In this proceeding, the Commission should define and identify which carrier(s) must respond to court orders. Carriers will only be in a position to effectuate interceptions of communications carried over their own networks. In other words, a carrier that packages or offers services provided over another carrier's network (e.g., resale), is not in a position to effect an interception on the other carrier's network. Thus, law enforcement may find that the authorizing court order must be delivered to more than one carrier in order to effectuate the interception. For example, the network carrier may be necessary for the interception, but the offering carrier (the reselling carrier) would be necessary for provision of customer information.

Finally, resellers were excluded from the list of carriers that would be subject to CALEA requirements. Although these carriers are not facilities-based and are not in a position to effectuate a network interception, these carriers could possess information, such as subscriber identification, that may be necessary in order to comply with a lawful request for interception. As such, to the extent necessary to ensure that the appropriate carrier or carriers have the necessary obligations, resellers and other like carriers should have specific CALEA compliance obligations. The rules should establish that a carrier is not required to obtain information or effectuate interceptions that are located or controlled by another carrier, and that it is the law enforcement's obligation to seek out the correct carrier for the information and interception required.

III. System Security And Integrity

A. The Commission Should Establish A Simple Framework For Internal Carrier Policies And Carrier Authorization Of Personnel

In this proceeding, the Commission proposes rules and policies for compliance with interception requests and to establish when the employee of a carrier is authorized by the carrier to conduct such an interception. In this respect, flexibility and simplicity in the rules should be the watchwords for the Commission. Rather than adopt detailed and inflexible rules for all carriers, the Commission should establish a simple

broad framework that allows carriers to fashion their own internal procedures. This framework would require carriers to establish their own internal process for assisting law enforcement agencies. These internal procedures could include:

1. specific training for employees that will conduct interceptions; and
2. safeguards, such as specific carrier-to-employee authorization, record keeping, and compliance with enumerated forms of lawful authorization, to ensure that interceptions are made lawfully and unlawful interceptions prevented.

If the Commission establishes such a framework, each carrier could develop a procedure that not only complies with CALEA requirements, but also allows the carrier to utilize its current personnel and employee structure to implement its CALEA obligations. If carriers have the flexibility to apply their existing resources to CALEA compliance, the burden to the carrier will be lessened.

B. Carriers Must Have Specific Legal Authority To Effect An Interception

In the *Notice*, the Commission tentatively concluded that the appropriate legal authorization for the purposes of CALEA would come in two forms: (1) a court order signed by a judge directing a telecommunications carrier to provide assistance in conducting specified electronic surveillance; or (2) a certification in writing by a designated senior law enforcement official that no court order is necessary.⁶ With respect to the certification

⁶ *Id.* at ¶¶ 28-29.

authorization, the Commission proposed that carriers incorporate into their policies and procedures the list of emergency circumstances found at 18 U.S.C. § 2518(7). PageNet agrees that interception must only be initiated by court order or by a written certification by law enforcement when Section 2518(7) circumstances exist.

In this proceeding, the Commission should codify in its rules that only a court order or, in an emergency situation enumerated under 18 U.S.C. § 2518(7), a letter from a senior law enforcement officer (explicitly defined) will suffice as lawful authorization for an interception. Complying with these forms of authorization, carriers should be shielded from liability if they initiate an interception at the behest of any law enforcement agency, but later find that the authorization provided by that law enforcement agency was insufficient. Further, carriers should be shielded from penalty if the carrier legitimately believes that a law enforcement agency has failed to provide the appropriate authorization and refuses to initiate an interception.

C. Record Keeping And Record Retention By The Carrier Should Be Minimized

Section 229(b)(2) of the Communications Act requires the Commission to establish rules requiring carriers to maintain records of any communications or call-identifying information related to the interception. PageNet agrees that the carrier's

records should contain the following information, as applicable, proposed by the Commission in the Notice:⁷

1. the telephone number(s) and circuit identification number(s) involved;
2. the start date and time of the interception;
3. the stop date and time of the interception;
4. the identity of the law enforcement officer presenting the authorization;
5. the name of the judge or prosecuting attorney signing the authorization; and
6. type of interception.

However, PageNet does not agree that the records need identify all of the carrier's employees possessing knowledge of the interception.⁸ In fact, it is not clear how the name of every employee that had knowledge of the interception could possibly be relevant in many circumstances. Rather, the record should identify the name of the employee responsible for authorizing the interception and the name of the technician, if any, actually performing the interception. Personal information regarding these employees, e.g., social security number, should not be made a part of the CALEA interception record. If such information is ever actually needed, it could be obtained from the carrier's personnel records. Carriers should also be permitted to document

⁷ *Id.* at ¶ 32.

⁸ *Id.* ¶ 32.

other information in their records that it believes relevant to the interception.

With respect to the duration of the retention of these records, unless there is some compelling reason of which PageNet is unaware to retain records of interceptions, PageNet recommends that carriers only be required to retain such records for one year.

D. Carriers Should Be Able To Certify CALEA Compliance

Section 229 of the Communications Act requires communications carriers to submit their security and record keeping policies to the Commission for review. In the *Notice*, the Commission proposed to exclude certain carriers from having to file their CALEA compliance policies with the Commission.⁹ There is no question that the burden on the Commission would be extensive if it had to receive, process, review, and verify or approve CALEA compliance policies for all carriers. For carriers, there would be additional costs in: (1) the preparation of formal filings with the Commission, (2) the prosecution of these filings, and (3) the Commission's processing of the CALEA compliance filings, all of which undoubtedly would be passed onto the carriers. This, of course, means higher service rates to customers.

There is a simple solution to this problem: each carrier should be able to certify that it is CALEA compliant without

⁹ *Id.* at ¶¶ 35 and 36.

having to submit a plan to the FCC for review and approval. Carriers would certify that they comply with the Commission's CALEA rules and policies pursuant to the framework established by the Commission in this proceeding. The notion of certification is not new. In fact, most wireless carriers certify that their facilities comply with the Commission's RF radiation exposure rules without the necessity of filing compliance plans and having such plans reviewed by the Commission. Carriers would be required to adopt such policies and make them available to the Commission or law enforcement agencies upon request, but would not be required to incur the regulatory burden and expense of submitting a formal filing with the Commission.

Accordingly, in order to reduce the burden of CALEA compliance on the Commission and on carriers, a simple certification should be employed to satisfy the Section 229 requirement.

IV. The Commission Should Provide Carriers With A Meaningful Opportunity To Demonstrate That CALEA Capability Requirements Are Not Reasonably Achievable

Under CALEA, a carrier may petition the Commission to determine whether it is reasonably achievable for a carrier to comply with the CALEA Section 103 capability requirements for equipment, facilities, or services deployed or installed after January 1, 1995. Section 109 of CALEA establishes factors that the Commission should consider in its evaluation of such petitions. When these factors are considered on the whole, they

appear to present a balancing test weighing the needs of law enforcement agencies against the ability of carriers to actually comply with CALEA in an effective manner.

Although PageNet agrees that there are important public interest reasons to assist law enforcement agencies, PageNet is concerned that over the next 10 years CALEA compliance may dictate the equipment, facilities, and services that carriers may provide to the public. Certainly, carriers will not offer services or install networks if such services cannot be made CALEA compliant in a reasonable and cost effective manner.

It should be noted that problems with the ability of the carriers to comply with CALEA capability standards will be cured over time if the CALEA standards are properly established. Specifically, once the standards have been established, manufacturers will begin the process of designing equipment that is CALEA compliant as manufactured. In addition, at some point carriers will not even consider buying or employing equipment that cannot meet the CALEA capability standards. This means that, over the short term, CALEA capability may have the undesired effect of slowing the rapid deployment of communications equipment and services, but in the long term, once standards are actually established, CALEA compliance will undoubtedly be built into the equipment deployed over the networks.

Without the CALEA standards, it is difficult to predict how onerous compliance will be. In this rulemaking, the Commission should set forth rules and policies that consider the burden on carriers that have not had the benefit of established capability standards when building networks and offering new services. If the carriers determine that over the short term the burden is high, the Commission should provide a meaningful opportunity for carriers to demonstrate that the CALEA capability requirements are not reasonably achievable.

V. Consideration Of Compliance Extensions Should Be Undertaken Today

The Commission has the authority to extend the time in which a carrier must comply with the CALEA Section 103 capability requirements for any equipment, facility, or service installed or deployed prior to October 25, 1998.¹⁰ The Notice stated that the last date upon which a carrier could request such an extension would be October 24, 1998.¹¹ The Notice further stated that it is not clear whether requests for extension of Section 103 compliance would be forthcoming and, therefore, the Commission would not propose specific rules for extension under CALEA Section 107 at this time.¹²

¹⁰ See Section 107(c) of CALEA.

¹¹ Notice at ¶ 49.

¹² Id. at ¶ 50.

PageNet believes several factors mandate that the Commission consider the question of extensions of Section 107 today, rather than force a panic among carriers 10 months from now. The most compelling factor today is that the CALEA capability standards have not been established.¹³ This means that for all equipment, services, and facilities installed or deployed after January 1, 1995, the standards for CALEA compliance have not been established. It does not seem possible, then, that in 10 months the entire telecommunications industry will become compliant with the Section 103 capability requirements.

Because capability standards have not been established, carriers have deployed or implemented new equipment, facilities, and services since January 1, 1995 without knowing whether such equipment, facilities, or services could be CALEA compliant, and manufacturers have likewise been unable to manufacturer CALEA compliant equipment or to consider how to assist carriers in modifying their existing post-1995 networks. Accordingly, PageNet suggests that based on these comments or its our motion, the Commission extend the compliance period to October 24, 2000. In the alternative, the Commission could initiate an inquiry into whether an industry-wide (or partial industry) extension is

¹³ The Telecommunications Industry Association ("TIA") has apparently established CALEA Section 103 standards for cellular and broadband PCS services. These standards seemingly do not take into account other services such as one-way and two-way messaging. Law enforcement, including the Federal Bureau of Investigation ("FBI"), objected to the adoption of the TIA standards.

appropriate. A decision regarding such an extension is needed quickly, if carriers will in fact have to comply with requirements which are not as of yet established within a timeframe that is less than one year.

WHEREFORE, for the foregoing reasons, PageNet respectfully requests that the Commission adopt CALEA rules and policies consistent with the comments provided herein.

Respectfully submitted,

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